Supreme Court, U.S.
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No. ____

IN THE
Supreme Court of the United States

JEFFREY BEARD,
Petitioner

v.

RONALD BANKS,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a prison policy that denies newspapers, magazines, and photographs to the most difficult inmates in the prison system in an effort to promote security and good behavior violate the First Amendment under the standards of *Turner* and *Overton*?

PARTIES TO THE PROCEEDINGS

The petitioner is Jeffrey Beard, in his official capacity as Pennsylvania's Secretary of the Department of Corrections. Respondent is Ronald Banks, a state prisoner.

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STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on February 25, 2005. A petition for rehearing was timely filed and was denied on March 22, 2005 by a vote of 6-5. Pet. App. 30a-31a. This petition is being filed within ninety days thereafter. This Court has jurisdiction pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. CONST., Amend I.

STATEMENT OF THE CASE

In Pennsylvania's prison system, the most incorrigible inmates face severe restrictions on their already restricted privileges, subject to reinstatement should their behavior improve. Among other things, they face an almost total prohibition on newspapers, magazines and photographs. Prison officials adopted this policy in order to modify the behavior of these incorrigible inmates, to deter misconduct by others, and to increase prison security. The Court of Appeals,

considering a First Amendment challenge to this policy, held that it could survive this challenge only if prison officials could establish that it addressed specific incidents of inmate misconduct, was the only way to address their rehabilitative and security concerns, and was actually successful. The Court should review this decision because is cannot be squared with the teachings of *Turner v. Safley*, 482 U.S. 78 (1987) and its progeny; or with the decisions of other courts of appeals facing similar situations.

1. The Pennsylvania Department of Corrections established a Long Term Segregation Unit (LTSU) at the State Correctional Institution at Pittsburgh to house inmates that are "the most incorrigible, the most difficult, problematic, and have demonstrated the most behavior conflicts." Pet. App. 34a-35a. Prison officials established the LTSU to improve both inmate behavior and prison security. *Id.*

The LTSU is the "last stop" for inmates who present intractable security or disciplinary problems. Inmates who have failed to respond to other, less restrictive disciplinary programs — known as Special Management Units and Restricted Housing Units — may be transferred into the LTSU. Other candidates for the LTSU are those who have a history of escape attempts or possessed weapons or implements of escape; who have seriously assaulted or caused injury to staff or other inmates; who have a history of sexual predation; or who have committed new crimes while in prison. Pet. App. 3a, fn.2.

Inmates in the less restrictive disciplinary programs have already lost many privileges, such as tobacco use and contact visits.[1] Further restrictions may be

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[1] A comparative chart, an attachment to Department of Corrections Policy 6.5.1, relating to disciplinary housing, and (continued...)

imposed or eased, depending upon the inmates' behavior. In the Special Management Units, for example, inmates may be forbidden or permitted to have radios and televisions in their cells, and may be allowed varying numbers of (non-contact) visits and telephone calls, depending on their progress level. Pet. App. 47a. Similarly, inmates are permitted to possess one newspaper at a time, ten photographs, and from one to ten magazines, depending again on their progress level. *Id.*

The LTSU imposes further restrictions on recalcitrant inmates. The unit has two levels. Inmates are initially placed in Level 2 — the more restrictive level — and spend at least ninety days at that custody level. Pet App. 3a. Besides other restrictions not challenged below, Level 2 inmates are not permitted any newspapers, magazines, or photographs in their cells, nor do they have access to the prison library where newspapers and magazines are available. Although Level 2 inmates are permitted limited visitation with family and correspondence, they are only permitted to receive news clippings in the mail which relate to them. Pet. App. 3a-4a. They are also permitted some legal papers and religious materials in their cells. After the first ninety days, prison officials review an inmate's status every thirty days to determine if promotion to Level 1 is appropriate. If it is, then the inmate may have a newspaper in his cell, and up to five magazines at a time.

Prison officials testified that this regimen promotes positive behavioral changes by encouraging inmates to improve their behavior to regain a desired privilege. This, officials said, was the "most important" goal,

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a part of the record before the lower court, is reproduced at Pet. App. 47a.

achieved by effectively telling the inmate, "You comply, you modify your behavior, and you can obtain these things, these privileges, . . ., you have the ability through your own actions to be promoted . . . from a Level 2 inmate to a Level 1 inmate, and we do that every day." Deposition of Joel Dickson, N.T. 86, 88. The restrictions also promote security, in that the limitations on property in the cells make it harder for inmates to conceal contraband; in addition, the specific property prohibited — newspapers and magazines — can be rolled up and used as blow guns or spears, used to fling feces or urine at guards, or as tinder to start a fire in the cell. Pet. App. 40a-41a.

2. The respondent brought this action on behalf of himself and those similarly situated, contending that the prohibition on newspapers, magazines and photographs for Level 2 inmates violates the First Amendment. The District Court certified a class, and the parties, after discovery, filed cross motions for summary judgment.

The District Court granted the petitioner's motion and denied the respondent's.[2] Applying *Turner v. Safley*, 482 U.S. 78 (1987), and the Court of Appeal's decision in *Fraise v. Terhune*, 283 F.3d 506 (3d Cir. 2002), the District Court noted the substantial deference due prison authorities. The District Court accepted that inmates housed in the LTSU posed unique security concerns, and that the policy of denying Level 2 inmates newspapers, magazines, and photographs did serve the goal of improving security, as newspapers, magazines, and photos could be used to fashion weapons or start fires, and that inmates would be more likely to use these items for that purpose than legal

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[2] A Magistrate Judge's report recommended that Petitioner's motion be granted, and the District Court adopted the report as its opinion.

papers and religious texts which they were permitted to have in their cells. Pet. App. 40a. The District Court also concluded that the policy was rationally related to goals of rehabilitation: "Having . . . been transferred to the LTSU, it seems not only rational to impose more restrictive conditions in an effort to encourage compliant behavior but imperative to the success of the LTSU." *Id.*

The District Court went on to say that inmates have alternative means of exercising their rights: first, by modifying their behavior and being promoted to less restrictive custody, and also by visitation and correspondence. Pet. App. 41a-42a. The court also concluded that, in view of the security concerns prompting the challenged policy, accommodating the prisoners' rights would have a negative impact on other inmates and guards in the LTSU. Pet. App. 43a. Finally, the District Court concluded that there were no ready alternatives to the policy: giving the inmates a "reading period" for example, "would not be without sacrifice to the prison's behavioral modification goals," would not prevent prohibited use of magazines and newspapers, and would have an impact on prison resources. Pet. App. 45a.

3.a. A divided panel of the Court of Appeals reversed and remanded for further proceedings. The panel majority acknowledged that "the deterrence of future infractions of prison rules can be an appropriate justification for temporarily restricting the rights of inmates," but thought that "it is unclear how the policy would achieve the deterrence that it seeks", Pet. App. 11a-17a, in view of the indefinite period of confinement in the LTSU and the discretionary nature of decisions regarding custody status; and noted that "the [Department of Corrections] has offered no evidence that the rule achieves or could achieve its stated rehabilitative purpose." Pet. App. 12a. The majority also discounted the prison officials' security concerns,

because "there [was] no evidence in the record of the misuse of periodicals or photographs in any of the ways described by the DOC," that is, no evidence of "specific incidents" where these materials had been used to start fires or fling feces. Pet. App. 14a. The majority also thought that, because Level 2 inmates were permitted other flammable materials in their cells, including clothing and legal and religious materials, the ban on papers, magazines and photos "may be too attenuated to be reasonable." Pet. App. 17a. The majority acknowledged testimony that few fires had been started in the LTSU and that paper products were generally used to ignite them but criticized the lack of specific testimony "as to the effect such a ban has had on the frequency of fires, be it in the LTSU or elsewhere." Pet. App. 15a.

The majority rejected the District Court's conclusion that inmates have alternative means of exercising their rights simply by modifying their behavior because "segregation in Level 2 is not linked to a particular infraction and is of potentially unlimited duration," Pet. App. 19a-20a, and because there were no affidavits in the record from those who made decisions regarding custody level or documentation of the review process. Pet. App. 20a.

Finally, the panel majority thought that the prison could accommodate the prisoners' interests by establishing "reading periods" during which they could read newspapers and magazines, or by escorting them individually to a secure mini library "to read a periodical of their choosing." Pet. App. 22a-24a.

b. Judge Alito dissented because he thought the prison policy was constitutional on its face under the *Turner* standards. Judge Alito thought that it was "'rational' for corrections officials to think that inmates who are not in Level 2 will be deterred from engaging in serious misconduct because they do not want to be

transferred to that unit and thus be subjected to the restrictions that accompany that assignment." Pet. App. 26a. "It is also 'rational'," Judge Alito continued, "for corrections officials to think that inmates who are in Level 2 will be deterred from engaging in serious misconduct while in that unit because they wish to be transferred out and thus to escape such restrictions." Pet. App. 26a-27a. Judge Alito noted that the indefinite nature of confinement in the LTSU might diminish its deterrent effect, it would not eliminate that effect as the majority thought, and also faulted the majority for misconstruing the nature of the first *Turner* factor: "This factor requires us to determine whether there is a '*logical connection* between the regulation and the asserted goal,' *see* 482 U.S. at 89 (emphasis added), not whether there is empirical evidence that the regulation in fact serves that goal. The entire system of prison discipline might be imperiled if each sanction for prison misconduct could not be sustained without empirical evidence that the sanction provided some incremental deterrent." Pet. App. 27a-28a. As to the second *Turner* factor, alternative means of exercising the right, Judge Alito found it significant that inmates in Level 2 could still read books and receive letters, and had the option of modifying their behavior so as to be promoted to Level 1. Pet. App. 28a. Finally, as to the availability and impact of accommodation, Judge Alito thought that the modifications to prison policies proposed by the majority "would almost certainly have an impact on prison resources." Pet. App. 29a.

4. The full Court of Appeals narrowly denied petitioner's request for *en banc* rehearing, by a vote of 6-5.

REASONS FOR GRANTING THE WRIT

The Court of Appeals' decision conflicts with the direction in *Turner v. Safley* that judgments regarding prison administration generally be made by prison

officials, not judges. By requiring prison officials to bear the burden of proving their policies constitutional, it also conflicts directly with *Overton v. Bazzetta*, a case which the Court of Appeals did not mention. The decision also exemplifies a conflict among the circuits regarding the proper application of *Turner* and *Overton*.

A. There is a Conflict Among the Circuits as to the Proper Application of *Turner*.

In *Turner*, the Court set forth the now familiar four pronged test for evaluating the constitutionality of prison rules and policies that implicate inmates' constitutional rights: whether there is a rational connection between the policy and a legitimate government interest, whether inmates have alternative means of exercising the right, the impact of accommodation on guards and other inmates, and whether there are ready alternatives to the policy that will accommodate the inmates' interest. 482 U.S. at 89-91. The Court repeatedly emphasized that the standard adopted in *Turner* was meant to be deferential to prison officials so that they could do their jobs properly.

Thus, in adopting the undemanding standard that a challenged prison regulation need only be "reasonably related to legitimate penological interests," the Court said "[s]uch a standard is necessary if prison administration and not the courts [are] to make the difficult judgments concerning institutional operations." 482 U.S. at 89 (internal quotations and citations omitted). The Court went on to say that "[s]ubjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." *Id.* Similarly, with respect to the "absence of ready alternatives" part of the standard, the Court emphasized that "[t]his is not a 'least restrictive alternative' test: prison officials do not

have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint." *Id.* at 90-91.

More recently, the Court in *Overton v. Bazzetta*, 539 U.S. 126 (2003), a case closely similar to this one, reiterated the "substantial deference [due] to the professional judgment of the prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them." *Id.* at 132 (citations omitted), and emphasized that "[t]he burden is not on the State to prove the validity of prison regulations but on the prisoner to disprove it." *Id.., citing Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S.119, 128 (1977); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 350 (1987); *Shaw v. Murphy*, 532 U.S. 223, 232 (2001).

1. Despite the Court's clear direction in *Turner*, and again in *Overton*, some Courts of Appeals, like the Third Circuit, have been reluctant to give proper deference to prison officials in matters of prison administration. The decision of the Court of Appeals here is a part of a split among the circuit courts applying *Turner* to analyze restrictions like these. A few Courts of Appeals, particularly predating the Court's decision in *Overton*, have invalidated bans on publications for reasons similar to the Third Circuit's, and even after *Overton*, some courts have failed to give prison authorities proper deference. For example, in *Crofton v. Roe*, 170 F.3d 957 (9th Cir. 1999), the Ninth Circuit held that a regulation on gift publications for the purpose of "inhibit[ing] contraband and strong-arming" was invalid because of the state's failure "to develop a record" to support the ban or to describe "any particular risk created by prisoners receiving such publications." Similarly, in *Thomas v. Leslie*, 176 F.3d 489 (10th Cir. 1999) (unpublished opinion), the Tenth Circuit rejected the argument that a ban on newspapers at a county

detention facility was rationally related to concerns that newspapers could be used as weapons or to start fires, because the prison allowed inmates to have other types of flammable materials in their cells. The court also felt that the inmate's ability to watch television was not an adequate alternative as it did not provide the "depth and diversity" of newspapers. More recently in *Jacklovich v. Simmons*, 392 F.3d 420 (10th Cir. 2004), a post-*Overton* decision, the Court said that a ban on publications for inmates promoted from intake status to Level 1 (the most secure custody level) justified as a behavioral management measure was "unsupported" as it appeared to be based more on custody status than on conduct.

By contrast, other Courts of Appeals have taken an approach more in line with *Turner* and *Overton*. In *Maydak v. United States*, 98 Fed.Appx. 1, 2004 WL 852218 (D.C. Cir. 2004), for example, the Court considered whether a policy of withholding certain publications from inmates in disciplinary custody (in this case, The Wall Street Journal), was constitutional under *Turner*. The Court said that it was permissible as a means to improve behavior, affirming a grant of summary judgment. The Court concisely analyzed each of the four prongs of the *Turner* test in a way very different from the Third Circuit: "permitting inmates whatever reading materials they desire would eliminate one of the punitive aspects of disciplinary segregation (factor one). The government also satisfies the other three factors: Maydak enjoyed access to other reading materials (factor two), accommodating Maydak would make disciplinary segregation appear less unattractive, having a potentially adverse effect on other inmates' incentives for following prison rules (factor three), and Maydak points to no real alternative that BOP could undertake as a disciplinary measure (factor four)." **1.

Other courts have handled similar issues in a similar way. In *Wirsching v. Colorado*, 360 F.3d 1191

(10th Cir. 2004), for example, affirming the grant of a motion for summary judgment, the Tenth Circuit upheld as constitutional a prison regulation that prohibited a convicted sex offender who refused to participate in a sex offender treatment program from visitation with his own children. The prison offered some testimony that visitation could put the children at risk and could be detrimental to the prisoner's rehabilitation. The prisoner argued, much as the respondent does here, that there was no evidence that he ever harmed or attempted to harm his daughter or children like her. Nevertheless, the Court said, although the evidence "may be debatable," the burden of proof was on the prisoner and "substantial deference" was due "the professional judgment of prison administrators," and concluded that "there is a rational connection between the CDOC policy and legitimate governmental interests." 360 F.3d at 1200, citation omitted.

The Court in *Wilkinson v. Austin*, No. 04-495 (June 13, 2005), recently recognized the growing trend to create "Supermax" facilities to segregate the most dangerous prisoners. Evidently, the courts of appeals need further guidance on the proper application of *Turner* and *Overton* to such situations, and the Court should review this case to provide that guidance.

B. The Court of Appeal's Decision is So Far at Odds with *Turner* and *Overton* that it Ought to be Summarily Reversed.

Alternatively, the Court should summarily reverse the judgment of the Court of Appeals because it is at odds with *Turner* and even more at odds with *Overton*, which is almost directly on point and ought to have controlled the result here.

1. In *Overton*, prisoners challenged regulations that restricted visitation rights, *inter alia*, with former

inmates, and limited visitation for inmates with multiple substance abuse violations to attorneys and members of the clergy for a period of two years, to be reinstated at the discretion of prison officials. With respect to the first restriction, the Court found a "self evident connection" between prohibiting visitation with former inmates and an interest in promoting prison security and preventing future crimes. The restriction for substance abuse violators, the Court said, was also legitimate to modify behavior: "withdrawing visitation privileges is a proper and even necessary management technique to induce compliance with the rules of inmate behavior, *especially for high-security prisoners who have few other privileges to lose.*" 539 U.S. at 134 (emphasis added). The Court also made it clear that the prisoner bears the burden of proving that a policy is unconstitutional, rather than prison authorities of supporting it. These principles are especially important in evaluating the constitutionality of housing units and programs, like this one, designed to deal with "problem" inmates.

The decision of the Court of Appeals here holds prison officials to a strict burden of proof, requires empirical evidence that their policies are narrowly designed to address specific instances of prisoner misconduct, and second-guesses them as to the feasibility of alternative means of accommodating the prisoners' asserted interest. In so doing, it has misapplied *Turner* and completely ignored *Overton's* allocation of burden of proof to the prisoner. It ignores as well as *Overton's* holding that the withholding of privileges is a constitutionally permissible means of attempting to modify prisoners' behavior: there is no constitutionally significant difference between a program that restricts visitation privileges to induce good behavior and one which restricts newspaper and magazine privileges to induce good behavior. The Court should review the case and summarily reverse on the basis of *Overton*.

2. The penological goals here - rehabilitation and security — are indisputable, and the connection between the goals and the challenged policy a simple matter of common sense. As to rehabilitation, it seems obvious, as the Court recognized in *Overton*, that taking privileges away from prisoners who misbehave and restoring them when their conduct improves provides an incentive for good behavior; as the Court likewise recognized in *Overton*, incentives of this kind are especially important — and hard to come by — for the most recalcitrant inmates, who already have fewer privileges than inmates in the prison's general population. The challenged policy is also an inducement to prisoners who are not in the LTSU to behave themselves so they will not be placed there. As to security, it is clear that prisoners can and do start fires, throw feces other objects and make weapons out of paper products like newspapers, magazines, and photographs, and are more likely to do so with these items than with religious texts which they may hold sacred.

It is equally clear that inmates in the LTSU have alternative, although limited means of communicating with the outside world: correspondence, visits, and most importantly, modifying their behavior so as to regain newspaper and magazine privileges. Finally, it is clear that no accommodation by prison officials is possible. Such an accommodation — such as the "reading period" endorsed by the Court of Appeals — would necessarily reinstate in some form the very privileges being withheld, without requiring the inmate to modify his behavior to regain them, thus undermining the policy's rehabilitative goals.

The Court of Appeals here refused to credit these obvious facts and connections, and refused to allow prison officials the leeway to use their experience, judgment, and common sense to deal with behavioral

problems. Instead, the Court of Appeals insisted upon evidence that officials acted in response to specific instances of misconduct, in a narrowly tailored regulation, supported by empirical evidence showing that the regulation is actually effective in achieving the desired goals. Prison officials are thus prohibited from anticipating problems, from experimenting with solutions to problems, and from using their judgment and experience to run the prisons. Instead, every policy that affects an inmate's constitutional rights – and there will be few that do not – will be tried in court. This is the antithesis of the proper arrangement described by the Court in *Turner* and reinforced in *Overton*, and the Court should summarily reverse.

CONCLUSION

The Court should grant the writ.

Respectfully submitted,

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DATED: June 20, 2005

APPENDIX

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-1245

RONALD BANKS, for himself and on behalf of all similarly situated prisoners who are confined or will be confined in Long Term Segregation Units of State Prisons located in the Western Judicial District of Pennsylvania,

Appellant

v.

JEFFREY BEARD, in his official capacity as Secretary of the Pennsylvania Department of Corrections

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On Appeal from the United States District Court for the Western District of Pennsylvania

District Court Judge: The Honorable Terrence F. McVerry
(D.C. No. 01-cv-1956)

Argued on October 22, 2003

Before: ALITO, FUENTES, and ROSENN, Circuit Judges

(Opinion Filed: February 25, 2005)

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OPINION OF THE COURT

FUENTES, Circuit Judge

Ronald Banks, on behalf of himself and all other Level 2 prisoners confined in the Long Term Segregation Unit ("LTSU") of the State Correctional Institution at Pittsburgh ("SCI Pittsburgh"), challenges the constitutionality of the Pennsylvania Department of Corrections' ("DOC") policy banning access to newspapers, magazines and photographs for Level 2

inmates, arguing that the policy violates the prisoners' free speech rights under the First Amendment.

The District Court granted summary judgment to the defendant and upheld the policy as reasonably related to legitimate penological interests. We disagree and therefore will reverse.

I. Factual and Procedural Background

The LTSU was established at SCI Pittsburgh in April 2000 as a place to confine a small population of inmates[1] which the DOC views, because of their history of behavior in prison, as too disruptive, violent or problematic to house elsewhere.[2] Inmates are classified at "Level 2" when admitted to the Unit, must remain there a minimum of 90 days, and may remain at Level 2 indefinitely. The length of time a prisoner may spend in the LTSU is open-ended and subject to the discretion of prison personnel. Department policy prohibits Level 2 prisoners from receiving newspapers or magazines

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[1] The maximum population in the LTSU is 40. (App. 92) Deposition testimony in this case discloses that, during the relevant period, the LTSU population was comprised of 36 Level 2 and three Level 1 inmates. (App. 93)

[2] The relevant DOC regulations state: "Any inmate who is, has or may be planning to engage in the following activities may be appropriate for assignment in the LTSU: (1) inmates who fail to complete SMU [Special Management unit]; (2) serious escape history; (3) assaultive behavior with the intent to cause death or serious bodily injury; (4) injury to staff and/or inmates; (5) engaging in facility disturbances(s); (6) recorded history of exerting negative influence in facility activities; (7) Security Threat Group (STG) member or other unauthorized organization(s); (8) Perpetuated criminal activity that threatens the community; (9) a history of being a sexual predator; and/or (10) possessing weapons and/or implements of escape." 6.5.1 Administration of Security Level 5 Housing Units Procedure Manual at 1-16.

directly from the publisher, from the prison library, or from any other source for the duration of their confinement at Level 2 status unless the publication is religious or legal in nature. Individual articles clipped from publications are prohibited, unless they relate to the inmate or his family. Also prohibited is the possession or receipt of photographs of spouses, other family members, or friends.

Other DOC rules which govern life at LTSU Level 2 prohibit inmates from having radios or televisions, permit phone calls only in emergencies or when related to inmates' legal representation, limit inmates to one visit with an immediate family member per month, and require inmates to remain in their cells 23 hours a day, one inmate to a cell. Inmates are permitted, however, religious or legal publications and paperback books that can be ordered from the prison library. To review legal materials, once LTSU inmate at a time may be let out of his cell and is escorted from it to a "mini law library" in hand and leg irons by two corrections officers. (App. 11)

The policy challenged here is unique in the state prison system, even among other segregated inmates. Level 1 LTSU inmates are permitted one subscription newspaper in their cells which can be exchanged on a one-for-one basis and are also permitted five subscription magazines at any given time.[3] Department policy also authorizes Special Management Unit ("SMU") inmates (another class of segregated inmates identified as being among the most difficult inmates in the system) to have various numbers of subscription newspapers, magazines and photographs in their cells, depending on their classification level. (App. 77) Similarly, dangerous inmates who are segregated in the Department's regular Restrictive Housing Unit on

[3] The photograph prohibition, however, remains unchanged.

Administrative Custody status for security reasons are permitted one subscription newspaper in their cells which can be exchanged on a one-for-one basis, as well as subscription magazines and up to 10 photographs.

Deputy Superintendent Joel Dickson, who supervises the LTSU, testified in his deposition that the prohibition serves several penological purposes, which were reiterated by the defendant in its briefs. First, and emphasized by Dickson as most important, is behavior modification and rehabilitation. Dickson explained that in Level 2, inmates are deprived of certain privileges to create an incentive to comply with prison rules and thereby be removed to Level 1 and eventually to the general population. Among Level 1 inmates, the prospect of having the privileges denied discourages backsliding. Also, Dickson explained that as inmates improve their behavior to earn privileges, they become better integrated members of prison society or, if released, better members of free society and "more productive citizen[s]." (App. 111) Second, the less material Level 2 prisoners have in their cells, the easier it is for correctional offices to detect concealed contraband and provide security. Third, newspapers and magazines can be rolled up and used as blow guns or spears, can fuel cell fires, or can be used as crude tools to catapult feces at the guards.

Plaintiff Ronald Banks filed the Complaint in this action on October 18, 2001. Seeking equitable and declaratory relief, the Complaint challenged the constitutionality of the DOC policy that denies Level 2 inmates access to newspapers, magazines and photographs of family members and friends. The inmates argued that, under *Turner v. Safley*, 482 U.S. 78 (1987), the policy offends their right to free speech either because it bears no rational connection to any legitimate penological interest or because it is an exaggerated response to such an interest. A motion for

class certification was filed and granted on March 22, 2002. After discovery was completed, the parties filed cross-motions for summary judgment in September of 2002.

On November 15, 2002, Magistrate Judge Robert Mitchell recommended granting summary judgment to the DOC. The recommendation reasoned that the *Turner* factors weighed in the DOC's favor and that the policy was rationally related to, and furthered the legitimate penological interests of, institutional security and prisoner rehabilitation. Despite Banks' objections, on January 10, 2003 the magistrate's recommendation and reasoning were adopted by order of the District Court.

The District Court reasoned first that the policy is not an impermissible First Amendment violation because it is rationally related to the legitimate and interrelated penological interests in rehabilitation and security. It encourages compliance with prison rules and deprives especially incorrigible prisoners of material from which they can fashion crude weapons or feed cell fires.

Second, the District Court held that the policy is not an exaggerated response to the stated penological concerns. The court agreed with the DOC that inmates can meaningfully exercise the burdened First Amendment rights by qualifying with good behavior for promotion to Level 1 or by corresponding with family and friends. Furthermore, given the particular intractability of Level 2 inmates, any further accommodation of their rights would impose costs that cannot be characterized as only *de minimus*.[4] Banks

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[4] Here, the DOC asserts the existence of the "ripple effect," cited in *Turner*, as a magnifier of cost in the prison environment. 482 U.S. at 90.

timely appealed the District Court's grant of summary judgment.

II. Jurisdiction and Standard of Review

The District Court had original jurisdiction over the action pursuant to 28 U.S.C. § 1343 because the claim asserts a violation of the First Amendment to the U.S. Constitution. This Court has appellate jurisdiction over the order of the District Court granting summary judgment pursuant to 28 U.S.C. § 1291. We review *de novo* the District Court's decision to grant the DOC's motion for summary judgment. *See Sutton v. Rasheed*, 323 F.3d 236, 248 (3d Cir. 2003). In reviewing the record, we view the evidence and any inferences therefrom in the light most favorable to the non-moving party, and resolve all factual conflicts in its favor. We reverse the District Court's decision where there are genuine issues of material fact precluding judgment as a matter of law. *See Suders v. Easton*, 325 F.3d 432, 440 (3d Cir. 2003).

III. Discussion

A. *The Turner Standard*

We have repeatedly echoed the Supreme Court's admonition that "prison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Ramirez v. Pugh*, 379 F.3d 122, 126 (3d Cir. 2004); *Fraise v. Terhune*, 283 F.3d 506, 515 (3d Cir. 2002) (quoting *Turner*, 482 U.S. at 84). In *Turner*, the Supreme Court acknowledged, however, that inmates' constitutional rights may in some cases be limited, and held that a prison regulation that impinges on inmates' constitutional rights "is valid if it is

reasonably related to legitimate penological interests." 482 U.S. at 89.[5]

The Supreme Court articulated an analytical framework within which the reasonableness of such a regulation is assessed by weighing four factors. First, there must be a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it." *Turner*, 482 U.S. at 89 (quotations omitted). Second, the court must determine "whether there are alternative means of exercising the right that remain open to prison inmates." *Id.* at 90. Third, the court must assess "the impact accommodation of the asserted constitutional right will have on guards and other inmates" and prison resources generally. *Id.* Finally, the court must consider whether there are "ready alternatives" to the regulation that "fully accommodate the prisoners' rights at *de minimus* cost to valid penological interests." *Id.* at 90-91. The existence of such alternatives is evidence that the regulation is an "exaggerated response to prison concerns." *Id.* at 90 (quotations omitted).

Although the Supreme Court emphasized that the judiciary is often "ill equipped to deal with the increasingly urgent problems of prison administration and reform," and should therefore give significant deference to prison officials in interpreting and implementing regulations,[6] the Court was not

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[5] Neither party contests that inmates have a First Amendment right to receive magazines and newspapers through the mail. *See Allen v. Coughlin*, 64 F.3d 77, 79 (2d Cir. 1995); *Sizemore v. Williford*, 829 F.2d 608, 610 (7th Cir. 1987).

[6] As the District Court correctly pointed out, *Fraise* also asserted that particular deference to prison authorities is especially appropriate when a regulation implicates prison security. 283 F.3d at 516.

relinquishing the policing of prison policy to prison administrators. *Id.* at 84 (quoting *Procunier v. Martinez*, 416 U.S. 396, 405 (1974)). To the contrary, in *Turner*, while the Supreme Court upheld a rule barring inmate-to-inmate correspondence as reasonably related to legitimate security interests, it also struck down an inmate marriage restriction as an "exaggerated response to petitioners' rehabilitation and security concerns." *Turner*, 482 U.S. at 91. The Court held that the rule "sweeps much more broadly" than can be explained by the stated objectives and therefore failed the reasonable relationship test. *Turner*, 482 U.S. at 98.

As the Eleventh Circuit has aptly noted, "traditional deference does not mean that courts have abdicated their duty to protect those constitutional rights that a prisoner retains." *Fortner v. Thomas*, 983 F.2d 1024, 1029 (11th Cir. 1993) (citations omitted). If *Turner* is to be a meaningful limit on the discretion of prison administrators, its four factors must be diligently weighed by reviewing courts.

B. Factor One: Rational relationship to legitimate penological interest

Banks argues that the connection between the policy and the valid penological objectives cited as its justification is too attenuated to be rational.

1. Rehabilitation

Unlike the government's interest in security, the rehabilitation objective has never been defined by the Supreme Court, and its contours remain "quite amorphous and ill-defined." *Ramirez*, 379 F.3d at 128 (citing *Amatel v. Reno*, 156 F.3d 192, 209 (D.C.Cir. 1998) (Wald, J., dissenting)). Clearly, however, restrictive prison policies can be designed to target

particular behaviors for which prisoners were incarcerated, or those that arose and presented security risks during incarceration.[7] *Id.*

The District Court essentially determined that (1) withholding privileges to get compliance is a sensible policy, and (2) denying all other privileges short of access to publications and photographs had proven in the past not to be a sufficient incentive for behavior modification because, if it had been, inmates would not have been transferred to LTSU Level 2. Therefore, the District Court found that denying publications and photographs was a rational next step.

Certainly, "deterrence of future infractions of prison rules" is a legitimate penological interest. *See Gregory v. Auger*, 768 F.2d 287, 290 (8th Cir. 1985); *Daigre v. Maggio*, 719 F.2d 1310, 1313 (5th Cir. 1983). In the Fifth and Eighth Circuits, temporary restrictions on prisoners' receipt of certain mail and subscription publications in disciplinary segregation have been upheld following exactly the logic advanced by the DOC here. Those courts held that such restrictions made disciplinary segregation less endurable and therefore discouraged inmates from the rule infractions that would lead to such segregation. *See also Guajardo v. Estelle*, 568 F.Supp. 1354, 1366 (D.C. Tex. 1983) (permitting inmates in solitary confinement access to books, magazines and newspapers may "water down the conditions in solitary and would make the threat of

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[7] In *Waterman v. Farmer*, for example, this Court upheld a prison regulation justified as rehabilitative, which restricted sex offenders' access to pornographic materials. 183 F.3d 208, 215 (3d Cir. 1999). Prison authorities submitted affidavits from two psychologists who testified that pornographic materials threatened to thwart the effectiveness of the treatment given to sex offenders, and therefore that limiting access to such material was a sensible rehabilitation strategy.

solitary confinement meaningless") (internal quotations omitted).

Although we agree that deterrence of future infractions of prison rules can be an appropriate justification for temporarily restricting the rights of inmates, we cannot say that the DOC has shown how the regulations in this case serve such a purpose. We recognize how such a rule could be reasonably related to a penological interest in rehabilitation in "disciplinary segregation" where inmates are placed for "specific rule infraction[s]" and for limited and specific periods, but this is not such a case. *Spellman v. Hopper*, 95 F.Supp.2d 1267, 1281 (M.D.Ala. 1999).

Although the DOC asserts that LTSU is a "disciplinary" status, the LTSU Level 2 is a unique kind of segregation with characteristics of both disciplinary and administrative segregation. Inmates come to LTSU because of "unacceptable behaviors" in other institutions, but they have not all been adjudicated by a hearing officer to have violated the DOC's rules. (App. 95) The LTSU is not a place where inmates are sent for a discrete period of punishment, pursuant to a specific infraction, but is a p'ace for "Long Term" segregation of the most incorrigible and difficult prisoners for as long as they fall under that umbrella.

All LTSU inmates must spend 90 days at Level 2 status when they first arrive, and although their behavior will be reviewed every 30 days to determine whether they deserve promotion to Level 1, that determination is entirely within the discretion of prison administrators and is not linked to any particular infraction or compliance. While disciplinary segregation ordinarily has a specified duration, inmates may remain in Level 2 and under the publication ban

indefinitely.[8] In fact, several inmates have remained in Level 2 since the LTSU's inception two years ago. As administered, it is unclear how the policy would achieve the deterrence it seeks. Not only is the rehabilitation justification illogical given the nature of LTSU confinement, but LTSU Level 2 is a far cry from the disciplinary contexts in which such bans have been deemed constitutional.

Furthermore, the DOC has offered no evidence that the rule achieves or could achieve its stated rehabilitative purpose. In *Waterman*, the DOC submitted affidavits from two psychologists who testified that pornographic materials threatened to thwart the effectiveness of the treatment given to sex offenders and who agreed that limiting access to such material was a sensible rehabilitation strategy. 183 F.3d at 215. In *Guajardo*, the defendants offered evidence as to the frequency and percentage of solitary confinements in the Texas Department of Corrections ("TDC") which showed that the negative perception of solitary confinement had a deterrent effect. 568 F.Supp. at 1368 ("a significant majority of TDC inmates

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[8] In fact, disciplinary segregation is usually quite short in duration. In *Daigre*, after addressing a guard profanely, Daigre was put in "administrative and punitive lockdown" for "a maximum of 10 days' isolation" pursuant to a finding of "defiance." 719 F.2d at 1311. In *Gregory*, the challenged policy was in place for inmates on Disciplinary Detention Status, which carried with it a 60-day maximum duration. 768 F.2d at 290. In *Guajardo*, the court was evaluating a publication ban in place in solitary confinement, a type of punitive segregation used as a sanction for violation of Texas Department of Corrections rules and regulations. An inmate could be confined in solitary for a maximum of 15 days, and an interval of at least three days was required between terms in solitary, during which time the inmate could have access to any publications withheld during the term. 568 F.Supp. at 1366.

have never experienced solitary confinement and less than half of those who are confined in solitary return a second time"). Here, there are *no* such supporting affidavits. The District Court presumably relied on Superintendent Dickson's testimony that the prohibition in question "gives us a means or method to say you comply, you modify your behavior, and you can obtain these things, these privileges," and his explanation that "we're very limited . . . in what we can and cannot deny or give to an inmate, and these are some of the items that we feel are legitimate as incentives for inmate growth." (App. 110) The District Court did not examine the fit between the policy and its rehabilitative goals, whether the ban was implemented in a way that could modify behavior, or inquire into whether the DOC's deprivation theory of behavior modification had any basis in real human psychology, or had proven effective with LTSU inmates. At oral argument, counsel for the DOC said it was a "hope." In fact, Banks argues that contrary to the assertions of the prison authorities and the District Court, isolating prisoners from the going-on in the outside world tends to undercut any genuine rehabilitation. There is, again, no evidence in the record on this point, but Banks cites to language in several cases to support this assertion.[9] It certainly seems relevant to the above inquiry, as well

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[9] Rehabilitative goals are "furthered by efforts to inform and educate inmates, and foster their involvement in the world outside the prison gates." *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1034 (2d Cir. 1985). In *Spellman v. Hopper*, there was testimony that deprivation of reading materials in segregation can cause "psychological deterioration" which in turn can cause inmates either to be "very withdrawn and curl up in infancy, or [to] become acting out and aggressive people." 95 F.Supp.2d at 1281; *see also Morrison v. Hall*, 261 F.3d 896, 904 n.7 (9th Cir. 2001) (citing studies and articles noting the "correlation between reading, writing and inmate rehabilitation").

as likely, that the ban may produce less rather than more compliance in at least some inmates.[10]

2. Security

With respect to security, the District Court held that there was a valid rational connection between the ban on periodicals and photographs in LTSU Level 2 and the constellation of security concerns put forth by the DOC. We cannot conclude from the record that such a connection exists. This is so for two reasons.

First, there is no evidence in the record of the misuse of periodicals or photographs in any of the ways described by the DOC. In fact, matches are not allowed in the LTSU. *See also Gregory*, 768 F.2d at 289 ("cellblock fires have been eliminated entirely . . . by new regulations prohibiting inmates from possessing matches"). There was no testimony as to the frequency of fires in the LTSU, nor testimony about any particular fires, in or out of LTSU segregation, and how and with

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[10] Our dissenting colleague contends that we misapply the first *Turner* factor by requiring the DOC to show some evidence to support its contention that the rule achieves or could achieve its stated rehabilitative purpose. However, our insistence that the DOC offer some evidence is not, in our view, at odds with *Turner* but rather a complementary part of the analysis in determining whether an asserted goal is logically connected to the prison regulation. *See Turner*, 482 U.S. at 89 (requiring prison authorities to put forward a legitimate governmental interest justifying the regulation). Indeed, in *Turner*, the Supreme Court evaluated the evidence in determining whether the prison rules in question served – in theory or in practice – the alleged penological goals. *See id.* at 91-93, 98-99. In our view, the paucity of any such evidence in this matter reinforces the conclusion that there is no valid, rational connection between the DOC rule and its stated rehabilitative purpose.

what materials they were set and fueled.[11] The same is true for the materials' potential use as weapons.

Furthermore, there was no testimony as to the effect such a ban has had on the frequency of fires, be it in the LTSU or elsewhere. In fact, Banks points out that inmates on Death Row, in Administrative Custody, and in the Special Management Unit are routinely permitted to have these items, and the DOC presented no evidence that the security or operations of these units are negatively affected to any palpable degree by the presence of these items.

The District Court dismissed this argument, agreeing with the DOC that a comparison to other forms of segregation within the Pennsylvania DOC is irrelevant because LTSU inmates are the "worst of the worst." However, there is no evidence before us to indicate that what sets these inmates apart from the rest is their misuse of non-legal or non-religious periodicals. The District Court's conclusion that "the fact that other segregated inmates have not created the same security concerns while in possession of newspapers and magazines is one reason they are in those units and not in the LTSU" is an inference that finds no support in the record. In fact, there is no indication in the record that any LTSU inmates were transferred there because they had created a security risk with periodicals or photographs. The LTSU inmates are certainly and unquestionably incorrigible, but whether their incorrigibility takes the form described by the District Court is an open question

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[11] Superintendent Dickson testified only that within the last six months there were "no more than two or three" cell fires in the entirety of the LTSU, and "paper products generally are the way it's first ignited." He also testified that he did not know of any instance where a LTSU Level 1 inmate used a newspaper or magazine to start or fuel a fire. (App. 112)

which cannot be resolved at the summary judgment stage by making inferences in favor of the DOC and without support in the record.

Second, we agree with Banks that given the materials Level 2 inmates are permitted in their cells, prohibiting a single newspaper or magazine has no significant relationship to the stated security objectives. There are many other non-prohibited means for the inmates to fuel fires, hurl waste, conceal contraband and create weapons. Under current regulations, each inmate is given a jumpsuit, a blanket, two bedsheets, a pillow case, a roll of toilet paper, a copy of a prison handbook, ten sheets of writing paper, several envelopes, carbon paper, three pairs of socks, three undershorts and three undershirts, and may at any point also have religious newspapers, legal periodicals, a prison library book, Bibles, and a lunch tray with a plate and a cup. Many of these items are flammable, could be used for the above purposes as effectively as a newspaper, magazine or photograph, and have been so used by LTSU Level 2 inmates.[12] The District Court again agreed with the DOC that the prohibition may not eliminate but certainly reduces the security risks with which the DOC is concerned, and that it is irrelevant that the policy does not absolutely prevent the harms it addresses because *Turner* is not a "least-restrictive-alternative" test. *Fraise*, 283 F.3d at 520; *Waterman*, 183 F.3d at 219.

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[12] In his deposition, Superintendent Dickson testified not only that under the challenged policy there have still been cell fires and rashes of feces-flinging in LTSU level 2, but also that inmates can and do use other permitted materials to create these disturbances: "Oftentimes it's with the cups that they're given for their drinks, things like that . . . .a piece of paper or whatever . . . that they can use to give a little leverage and fling the materials." (App. 112)

Although the District Court is correct that the policy need not be narrowly tailored to the harm it addresses to pass constitutional muster, its conclusion here has some flaws. Even if the policy need not be "narrowly tailored" to the stated interests, if the prohibition of newspapers, magazines and photographs has only a minimal effect on security in the LTSU because of the other materials that they are permitted in the cells, the relationship between the policy and the penological interest may be too attenuated to be reasonable.[13] It is important to note here that the inmates are not requesting unlimited access to innumerable periodicals but for the ability to have one newspaper or magazine and some small number of photographs in their cells at one time. We fail to see how the DOC could have reasonably thought that the challenged policy, which permits an inmate to have in his cell 10 sheets of writing paper and one records center box full of legal or religious periodicals or texts, would meaningfully

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[13] *See Spellman*, 95 F.Supp.2d at 1278; *Jackson v. Elrod*, 671 F.Supp. 1508, 1511 (N.D. Ill. 1987) *aff'd*, 881 F.2d 441 (7th Cir. 1989) (admission that hardcover books are no greater a risk to conceal contraband than, for example, clothing, paperbacks, mattresses and light fixtures, "disproves defendant's assertion of a rational connection between their hardcover book ban and a governmental interest"); *Mann v. Smith*, 796 F.2d 79, 82-83 (5th Cir. 1986) (ban on newspapers and magazines represents exaggerated response to legitimate need to preserve discipline and maintain security); *Kincaid v. Rusk*, 670 F.2d 737, 744 (7th Cir. 1982) (total ban on newspapers unjustifiable when hazards of newspaper possession could as well be caused by reading material detainees were permitted to have); *Payne v. Whitmore*, 325 F.Supp. 1191, 1193 (N.D.Cal. 1971) ("Jail cells are already filled with an abundance of materials quote suitable for fire starting . . .; yet no one suggests that cells ought to be stripped of bedding, clothing, toilet paper, writing materials, and so on.").

improve prison security by forbidding him one copy of the *Graterfriends* prison newsletter.[14]

The District Court asserted that the prohibited materials are "more likely" to be used to create a security concern and are "most easily and commonly used as weapons or to set fires and fling feces" than religious or legal materials, and therefore the .link between the policy and the stated interest is more than tenuous. (App.125) However, nowhere in Dickson's affidavit does he describe specific incidents where the prohibited materials were used in any manner posing a security risk by LTSU inmates before or after they were transferred to LTSU. He articulates his belief that periodicals are more well-suited to create particular weapons, but admits that the items already in inmates' cells certainly could and have been used to fuel fires, hide contraband, fling feces and create weapons. (App.112)

C. Factor two: Means for exercising the burdened right

Under this factor, we are asked to "focus on the burden that the regulation imposes on an inmate's ability to engage in constitutionally protected activity." *DeHart v. Horn*, 227 F.3d 47, 53 (3d Cir. 2000) (en banc). If other avenues are open for the inmate to exercise the right in question, the court should exhibit deference to the judgment of corrections officials, while if no other avenues are available, the inmate's right is

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[14] In a memo dated February 8, 2001, and distributed to LTSU inmates, Superintendent Dickson stated that the publication *Graterfriends* is a newsletter, not legal mail, and therefore denied to Level 2 inmates. *Graterfriends* is a Pennsylvania-based newsletter published under the auspices of The Pennsylvania Prison Society to which prisoners contribute and which is distributed to prisoners and other members of the corrections community.

given greater weight in the Turner balancing process. *Id.*[15]

Banks argues that while Level 2 inmates can read leisure books, they have no meaningful access to current news accounts or published information about current political, social, or other public events and activities occurring outside the prison walls, and they have no way to look at images of loved ones and friends apart from the possibility of infrequent visits. The District Court, however, disagreeing with Banks, found that inmates had sufficient means to engage in the constitutionally-protected activities.

The District Court characterized the periodicals ban as "not a blanket prohibition" because Level 2 inmates can qualify by good conduct to be promoted to LTSU Level 1. The District Court's justification for this determination is its explanation that "each of these prisoners has the option of modifying his behavior and being promoted to a less restricted environment where access to newspapers magazines and photographs may be enjoyed." (App. 126) As the DOC elaborated in its brief, "there is no reason to suppose that a prison administration would not respond favorably to a prisoner's initiative to qualify for relief from the ban on periodicals or photos through exhibiting good behavior."

The District Court and the DOC are correct in noting that inmates can be promoted from Level 2 to Level 1 and, if they are, they will gain access to the prohibited materials. However, that does not change the fact that the prohibition is indeed a "blanket" one,

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[15] Although this inquiry depends in part on how the scope of the constitutional right is defined, neither the parties nor the District Court define the right in question, nor does the District Court's analysis depend on a particular understanding of the rights in question.

and that as long as an inmate is at Level 2 status and is subject to the policy in question, he has no alternative means to exercise his First Amendment right of access to a reasonable amount of newspapers, magazines, and photographs.

Moreover, there is no reason to infer that the process of "promotion" from Level 2 to Level 1 is as much under the inmates' control as the DOC and the District Court characterize it. As noted above, segregation in Level 2 is not linked to a particular infraction, and is of potentially unlimited duration. Any inmate who enters LTSU will remain at Level 2 for 90 days no matter how he modifies his behavior. Furthermore, the only information in the record as to how the process works is the following explanation from Dickson's deposition:

> You know, you have the ability through your own actions to be promoted, if you will, from a level 2 inmate to a level 1 inmate, and we do that every day. We have a system where the unit management team reviews each inmate's progress every thirty days. The unit management team is made up of the unit manager, custody staff, psych staff, nursing staff. And we try to give and provide every inmate every opportunity to progress through this system and to be able to obtain the privileges. (App. 110)

There are no affidavits in the record from any of those decision-makers mentioned by Dickson, nor is there any documentation of the review process. Although at Dickson's deposition, Banks' attorney apparently examined and requested some documents which indicated, with respect to current LTSU inmates, how long they had been at the facility and how long

they had been at Level 2, those documents are also not in the record. Again, unlike the policies in solitary and disciplinary confinement examined in *Daigre*, *Gregory*, and *Guajarde*, the LTSU prohibition cannot be characterized as merely a "time, place or manner" restriction. *See, e.g.*, *Gregory*, 768 F.2d at 290 ("[the policy is] not directed at what mail an inmate could receive, but only at when he could receive it").

D. Factors Three and Four: Accommodation

We now consider the District Court's analysis of *Turner's* third and fourth factors. Under these factors, we must determine whether the right in question can be accommodated without significant negative consequences in terms of efficiency and security, *DeHart*, 227 F.3d at 58, and "whether the prison can easily serve its interests with alternative means without infringing upon the rights of prisoners," *Crofton v. Roe*, 170 F.3d 957, 959 (9th Cir. 1999). The Supreme Court has suggested that the "existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an exaggerated response to prison concerns." *Thornburgh v. Abbott*, 490 U.S. 401, 418 (1989) (citation and quotations omitted).

In *Fraise*, inmates challenged a policy which authorized prison authorities to designate and transfer core members of "Security Threat Groups" as violative of the First Amendment's Free Exercise Clause, as well as the Equal Protection and Due Process Clauses.[16] The Court determined that the third prong weighed in

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[16] A Security Threat Group ("STG") is a group of inmates, designated by the Commissioner, which "poses a threat to the safety of staff, other inmates, the community, and/or damages to, or destruction of property, and/or interrupting the safe secure and orderly operation of the correctional facility(ies)." *Fraise*, 283 F.3d at 509.

favor of the DOC and, quoting *Turner*, stated that "[w]hen accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials." *Fraise*, 283 F.3d at 520 (quoting *Turner*, 482 U.S. at 90). It is certainly supported by the record, as the District Court repeatedly asserted, that the LTSU Level 2 inmates are some of the most "intractable" in the Pennsylvania prison system. We cannot agree, however, on the record before us, that accommodation of those prisoners' rights by giving them reasonable access to a limited number of periodicals and photographs would have such a "ripple effect."

At no point does Banks propose that Level 2 inmates be allowed unmitigated and unregulated access to all periodicals. Rather, Banks proposes, and the District Court discussed, two alternative policies which would accommodate the prisoners' rights. First, the DOC could establish a specific reading period, or several different reading periods, in which guards deliver a single newspaper or magazine to an inmate's cell, if requested, and retrieve it at the close of the period. The DOC could easily control the number of periodicals in his cell at one time, the frequency of the distributions, the amount of time any inmate would be in possession of the materials, as well as the number of inmates who would have periodicals in their cells at any one time.[17] The DOC could also limit the total number of photographs a Level 2 inmate could have in his cell at one time to what they consider a reasonable number. In conjunction with this policy, access to periodicals could be entirely withheld from those individual

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[17] Volume control is a well-recognized alternative to the blanket exclusion of items protected by the First Amendment. *See Clement v. California Dept. of Corrections*, 220 F.Supp.2d 1098, 1113 (N.D.Cal. 2002); *Spellman*, 95 F.Supp.2d at 1286.

prisoners who, in the judgment of prison officials, *would* pose a particular risk given their records, or those inmates who *have* abused their use of periodicals or photographs. The DOC asserts that such a limited restriction would not prevent Level 2 inmates from using the materials to start fires, fling feces and create weapons and therefore, during the reading period, extra monitoring of cells would be required, thus affecting the prison's resources and possibly the safety of other inmates.

We fail to see, however, as discussed above under factor one, how an inmate's hour-long possession of *Graterfriends* would require further monitoring when at any time that inmate may be in possession of 10 sheets of writing paper, and as many copies of the Watchtower, the Jewish Daily Forward, and the Christian Science Monitor Magazine as can fit in a records center box. As discussed above, the District Court's assumption that prisoners would be more reluctant to use religious materials for such nefarious purposes is unsupported by the record. Furthermore, at any point, the entire LTSU can house no more than 40 inmates, one-tenth of one percent of the state's prison population. (App. 95) Even if limited distribution of periodicals were to require additional monitoring, such an accommodation would have a minimal impact on prison resources.

Alternatively, individual prisoners could be escorted to the secure mini-law library to read a periodical of their choosing. Again, the District Court found that such an accommodation would intensify security concerns by increasing the amount of inmate movement and thereby placing a formidable burden on LTSU staff.[18] Inmates are already permitted to leave

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[18] Here, the District Court relies on *Allah v. Al-Hafeez*, 208 F.Supp.2d 520, 530 (E.D.Pa. 2002), in which the court found

their cells under guard escort to use the library to view legal materials, so individual inmate escort has not been deemed prohibitively burdensome or dangerous by prison administrators. Although it is possible that the *demand* for mini-law library sessions may increase if the policy were changed, the DOC has not shown how this would significantly increase the burden on prison staff. Superintendent Dickson explained in his deposition that under current LTSU policy, one inmate is allowed out of his cell at a time to visit the law library for one two-hour session. A roster of requests, like a waiting-list, is maintained and fulfilled on a first-come first-serve basis. The amount or frequency of inmate movement is already regulated. If the inmates' rights to read other periodicals were accommodated, that would not change. We fail to see how the mere addition of non-legal and non-religious periodicals to the materials already available to the inmates in the library would create the "ripple effect" cited by the DOC. In short, the DOC has not shown that a change in the publication ban would mean "significantly less liberty and safety for everyone else, guards and other prisoners alike." *Abbott*, 490 U.S. at 418 (quoting *Turner*, 482 U.S. at 92).

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that the third *Turner* factor weighed in the prison authorities' favor because the inmate was particularly ill-behaved and accommodating his presence at religious services would require more monitoring of those services, thereby straining prison resources and affecting the prison staff and other inmates. Although the *Turner* factors are evaluated independently, it is important to note with respect to this decision that the prison policy was much narrower and the court's analysis was informed by the fact that the inmate had many meaningful ways to practice his religion without attending services. He could meditate, pray and study his religion, as well as discuss it with other inmates outside his cell. *Id.*

Finally, the District Court asserted that the alternatives proposed come at more than a *de minimus* cost to the DOC's behavior modification goals because the accessibility of periodicals would render the threat of Level 2 segregation toothless as a deterrent. However, the District Court overlooked the extent to which, even without the challenged restriction, Level 2 LTSU segregation is more restrictive than Level 1 in significant respects. For example, Level 1 inmates are permitted two family visits and one fifteen minute telephone call per month. They are also permitted to spend $5.00 per week at the commissary on items defined by the Unit Team. Additionally, while inmates at both levels received in-cell counseling and visits from chaplains, and can be employed as Unit Janitor, only Level 1 inmates receive compensation as per DC-816 Inmate Compensation System, and only Level 1 inmates are permitted GED and Special Education in-cell study. (App. 32)

IV. Conclusion

For the reasons stated above, we believe that the DOC's policy that prohibits inmates confined in the LTSU at Level 2 status access to photographs, and all newspapers and magazines which are neither legal nor religious in nature, cannot be supported as a matter of law by the record in this case. Accordingly, the summary judgment of the District Court will be reversed and the case remanded for further proceedings consistent with this opinion.

ALITO, Circuit Judge, dissenting:

At issue in this case are restrictions that the Pennsylvania Department of Corrections imposes as a last resort on the most disruptive and dangerous .1% of its prison population. These restrictions apply only as

long as an inmate remains in Level 2 of the LTSU, an assignment that may terminate after as little as 90 days. The question before us is whether these temporary, last-resort restrictions are facially unconstitutional under the standard set out in *Turner v. Safley*, 482 U.S. 78 (1987), a standard that instructs courts to extend considerable deference to judgments of correctional officials. Because I believe that the majority has misapplied *Turner*, I must respectfully dissent.

Under *Turner*, prison regulations that restrict constitutional rights must be sustained if they are "reasonably related to legitimate penological interests." 482 U.S. at89. *Turner* noted four factors to be considered in determining whether the requisite reasonable relationship exists: (1) whether there is "a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it"; (2) "whether there are alternative means of exercising the right that remain open to prison inmates"; (3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates"; and (4) whether there are "ready alternatives" to the challenged regulation." *Id.* at 89-90 (citation omitted). I will address each factor.

First factor: Rational relationship between regulation and legitimate penological interests. I agree with the District Court that this factor weights in favor of the constitutionality of the challenged regulations because there is a "rational" relationship between that restriction and the legitimate penological objective of deterring misconduct. It is "rational" for corrections officials to think that inmates who are not in Level 2 will be deterred from engaging in serious misconduct because they do not want to be transferred to that unit and thus to be subjected to the restrictions that accompany that assignment. It is also "rational"

for corrections officials to think that inmates who are in Level 2 will be deterred from engaging in serious misconduct while in that unit because they with to be transferred out and thus to escape such restrictions.

The majority disagrees with these conclusions for two reasons. First, the majority apparently believes that a sanction cannot deter unless a potential violator knows with some specificity the type misconduct that will result in the imposition of the sanction and the length of time that the sanction will last. The majority concedes that "deterrence of future infractions of prison rules can be an appropriate justification for temporarily restricting the rights of inmates" and that other courts of appeals have sustained rules restricting the receipt of newspapers by prisoners in disciplinary segregation. *See* Maj. At 9 (citing *Gregory v. Auger*, 768 F.2d 287, 290 (8th Cir. 1985); *Daigre v. Maggio*, 719 F.2d 1310, 1313 (5th Cir. 1983)). The majority finds these precedents inapplicable because the "LTSU is not a place where inmates are sent for a discrete period of punishment, pursuant to a specific infraction, but a place for 'Long Term' segregation of the most incorrigible and difficult prisoners for as long as they fall under that umbrella." *Id.*

The majority's reasoning is unsound. The uncertainties noted by the majority may diminish the deterrent effect of the regulations on some inmates who are not yet in Level 2, but there is no reason to think that these uncertainties entirely eliminate the deterrent effect of the regulations on the general prison population. Similarly, it is rational to believe that the challenged restrictions provide an incentive for those inmates who are already in Level 2 to refrain from disruptive behavior in the hope of obtaining a transfer out of the unit. Again, uncertainty about what must be done to obtain such a transfer or about when such a transfer may be available may have an impact on the

degree of the incentive, but there is no reason to suppose that the incentive is wholly destroyed.

Second, the majority concludes that the regulations are not rationally related to the goal of deterring misconduct because "the DOC has offered no evidence that the rule achieves or could achieve its stated rehabilitative purpose." Maj. Op. at 10. In taking this approach, the majority misconstrues the nature of the fist *Turner* factor. This factor requires us to determine whether there is a "*logical connection* between the regulation and the asserted goal," see 482 U.S. at 89 (emphasis added), not whether there is empirical evidence that the regulation in fact serves that goal. The entire system of prison discipline might be imperiled if each sanction for prison misconduct could not be sustained without empirical evidence that the sanction provided some incremental deterrent.

Second factor: alternative means of exercising the right. This is the most troubling of the four factors, but I do not think that it is sufficient to support the majority's conclusion that the regulations are facially unconstitutional. The regulations impinge upon the right to receive information about current events and communications (in the form of photographs) from family members and friends, but the restrictions are not absolute. Inmates in Level 2 may still read books from the prison library and may receive letters. Moreover, as the District Court noted, inmates in Level 2 have the "option of modifying their behavior and being promoted to a less restricted environment." Report & Recommendation at 8. An as-applied challenge by an inmate subjected to lengthy confinement in Level 2 despite a record of reformed behavior would present different considerations, but the majority's opinion is not limited to such a case.

Third and fourth factors: Availability and impact of accommodation. The majority proposes modifications in prison policies that would almost certainly have an impact on prison resources. The majority first suggests that guards could deliver requested newspapers and magazines to inmates' cells and then retrieve these materials after the expiration of a specified "reading period." Maj. Op. at 18. Providing this service for each of the 40 inmates in Level 2 would be time consuming. "Alternatively," the majority states, "individual prisoners could be escorted to [the] secure mini-law library to read a periodical of their choosing." Maj. Op. at 19. This service, however, would undoubtedly impose a significant burden, particularly since the inmates in question are those whom the Department of Corrections has classified as the most violent and disruptive. It is Department policy that Level 2 inmates may not be transported from their cells unless they are placed in hand and leg irons and are escorted by two officers.

Taking into account all four of the *Turner* factors, I conclude that the challenged regulations are not facially unconstitutional. On their face, these regulations are reasonably related to the legitimate penological goal of curbing prison misconduct, and I would therefore affirm the decision of the District Court.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-1245

RONALD BANKS, et al.

Appellants

v.

JEFFREY BEARD

On Appeal from the United States District Court
for the Western District of Pennsylvania

District Court Judge: The Honorable Terrence F. McVerry
(D.C. No. 01-cv-1956)

SUR PETITION FOR REHEARING EN BANC

Present: SCIRICA, Chief Judge, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, BARRY, AMBRO, FUENTES, SMITH, VAN ANTWERPEN and [19]ROSENN, Circuit Judges

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The Petition for Rehearing filed by the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court

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[19] Judge Rosenn's vote is limited to panel rehearing only.

and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the Petition for Rehearing by the panel and the Court en banc, is hereby DENIED. Chief Judge Scirica, Judge Nygaard, Judge Alito, Judge Barry and Judge Van Antwerpen would have granted rehearing en banc.

BY THE COURT,

/s/ Julio M. Fuentes
Circuit Judge

DATED: March 22, 2005
CLC/cc: Jere Krakoff, Esq.
Kemal A. Mericli, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RONALD BANKS, for himself and on behalf of all similarly situated prisoners who are confined or will be confined in Long Term Segregation Units of State prisons located in the Western Judicial District of Pennsylvania Plaintiffs	)	
v.	)	Civil Action No. 01-1956
JEFFREY BEARD, in his official Capacity as Secretary of the Pennsylvania Department of Corrections Defendant.	)	

MEMORANDUM ORDER

AND NOW, this 10th day of January, 2003, after the plaintiff, Ronald Banks, filed an action in the above-captioned case, and after cross motions for summary judgment were submitted by the parties, and after a Report and Recommendation was filed by United States Magistrate Judge Robert C. Mitchell (*Document No. 25*) granting the parties ten days after being served with a copy to file written objections thereto, and upon consideration of the objections filed by plaintiff (*Document No. 26*), which the Court notes were virtually identical to the arguments made by plaintiff in his brief in support of summary judgment and said arguments were previously given due consideration by the Magistrate Judge, and upon independent review of the motions and the record, and upon consideration of the

Magistrate Judge's Report and Recommendation, which is adopted as the opinion of this Court,

It is ORDERED, ADJUDGED, AND DECREED that defendant's motion for summary judgment (*Document No. 16*) is GRANTED and plaintiff's motion for summary judgment (*Document No. 20*) is DENIED. .

It is further ORDERED that final judgment of this Court is entered pursuant to Rule 58 of the Federal Rules of Civil Procedure.

/s/ Terrence F. McVerry
Terrence F. McVerry, Judge
United States District Court

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RONALD BANKS,	)	
Plaintiff,	)	
	)	
vs.	)	Civil Action No. 01-1956
	)	
JEFFREY BEARD,	)	
Defendant.	)	

REPORT AND RECOMMENDATION

I. Recommendation

It is respectfully recommended that the motion for summary judgment submitted on behalf of defendant (Docket No. 16) be granted, and plaintiffs' motion for summary judgment (Docket No. 20) be denied.

II. Report

Presently before this Court for disposition are cross motions for summary judgment.

Plaintiff Ronald Banks commenced this action under 42 U.S.C. § 1983, on behalf of himself and other similarly situated prisoners alleging that defendant's policy denying certain segregated inmates access to newspapers, magazines and photographs is violative of their First Amendment rights.

The record demonstrates that the Department of Corrections has established a Long Term Segregation Unit ("LTSU") at the State Correctional Institution at Pittsburgh ("SCIP") to house inmates that are "the most incorrigible, the most difficult, problematic, and have

demonstrated the most behavior conflicts."[20] The purpose of creating the LTSU is to ensure the safety and security of the Department and to promote behavioral changes in the inmates assigned there.[21] The LTSU population presently consists of approximately forty inmates and constitutes approximately one tenth of one percent of the entire prison population in the state system.[22] The LTSU is the most restrictive in the State and policy permits only one inmate out of his cell at a time who must then wear hand and leg restraints and must be escorted by two correctional officers.[23] Each inmate coming into the LTSU spends a minimum of ninety days on "Level 2" where they are prohibited from having newspapers, magazines or photographs in their cells.[24] Nor do Level 2 inmates have access to the prison library where newspapers and magazines subscribed to by the prison are held. Moreover, they may only receive news clippings in the mail if they have some connection to the inmate.[25] As such, any magazines, newspapers or photographs in the inmates possession when he is transferred to the LTSU are placed in storage and any such materials subsequently found in an inmate's possession are considered contraband and

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[20] Deposition of Deputy Superintendent Joel Dickson ("Dickson Depo."), pp. 25-26, 28, 92. A copy of Mr. Dickson's deposition transcript has been submitted by defendant as Appendix A (Docket No. 19).

[21] *Id.* at 24-25.

[22] *Id.* at 17, 25.

[23] *Id.* at 89.

[24] *Id.* at 18-19, 46-48, 68-70.

[25] *Id.* at 46-48.

confiscated.[26] Indeed, the only reading material that Level 2 inmates are permitted to have are paperback books that they can order from the library.[27]

After the initial ninety-day period, correction officials review each inmate's progress every thirty days to determine whether their behavior warrants a promotion to Level 1 where the inmates are permitted to have an ordinary general circulation newspaper in their cell and up to five magazines that may be exchanged on a one-for-one basis.[28] Presently, approximately three of the thirty-nine inmates held in the LTSU are on Level 1.[29]

Deputy Superintendent Joel Dickson, who supervises the LTSU at SCIP, testified at his deposition that these prohibitions serve several penological purposes. First, it promotes behavior modification. Defendant's position is that by ameliorating the prohibitions for Level 1 inmates and virtually eliminating them for the general prison population, it encourages the most difficult prisoners to not only become integrated into the general population but, upon release, to be a more productive citizens. Second, according to Deputy Dickson, the policy promotes security as the less property these inmates have in their cells the more difficult it is for them to conceal contraband. As well, it minimizes the materials available to these inmates that can be used to create harm either to themselves or to others.[30] In this regard, Dickson testified that newspapers and magazines can

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[26] *Id.* at 48, 50-51, 71.

[27] *Id.* at 91.

[28] *Id.* at 20, 55-56, 88.

[29] *Id.* at 17.

[30] *Id.* at 85-88.

be rolled up and used as blow guns and spears, used to fling feces and urine at the guards, or used as tinder for cell fires.[31]

Plaintiff Banks filed the instant complaint on October 18, 2001, on behalf of himself and other similarly situated prisoners alleging that defendant's policy prohibiting Level 2 inmates from maintaining magazines, newspapers and photographs in their cells violates the free speech component of the First Amendment to the United States Constitution. Plaintiff seeks equitable and declaratory relief as well as the issuance of preliminary and permanent injunctions. A Motion for Class Certification was also filed by plaintiff on January 14, 2002, and, unopposed by defendant, was granted on March 22, 2002.[32]

The parties have now filed cross motions for summary judgment. Summary judgment is appropriate where "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). *See Marzano v. Computer Science Corp.*, 91 F.3d 497, 501 (3d Cir. 1996) In deciding a motion for summary judgment the court must view all inferences in a light most favorable to the non-moving party. *Id.*, citing *Armbruster v. Unisys Corp.*, 32 F.3d 768, 777 (3d Cir. 1994). The non-moving party, however, may not rely on bare assertions, conclusory allegations or mere suspicions to support its claim but must demonstrate by record evidence the meritorious nature of the claim. *Orsatti v. New Jersey*, 71 F.3d 480, 484 (3d Cir. 1995).

The law is not in dispute. In an effort to balance an inmate's right to maintain his or her Constitutional

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[31] *Id.* at 85-88, 91-92.

[32] *See* Docket Nos. 9 and 10.

protections within the prison setting and the necessity of limiting those rights by prison officials in order to accommodate the demands of managing a prison, the United States Supreme Court has held that a prison policy that intrudes on an inmate's constitutional rights will nevertheless be upheld "if it is reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987) ("*Turner*"). *See Fraise v. Terhune*, 283 F.3d 506, 515 (3d Cir. 2002) ("*Fraise*"). As reiterated by the Court of Appeals for the Third Circuit, *Turner*, requires a court to weight four factors in determining whether this standard has been met:

> [F]irst, whether the regulation bears a "valid, rational connection" to a legitimate and neutral governmental objective; second, whether prisoners have alternate ways of exercising the circumscribed right; third, whether accommodating the right would have a deleterious impact on other inmates, guards, and the allocation of prison resources generally; and fourth, whether alternatives exist that "fully accommodate[] the prisoner's rights at a de minimis cost to valid penological interests."

Fraise v. Terhune, 283 F.3d at 513-14, quoting *Turner v. Safley*, 482 U.S. at 91. Although these factors are merely guidelines by which to evaluate the reasonableness of prison regulations "'the first fact looms especially large,' because it 'tends to encompass the remaining factors, and some of the criteria are apparently necessary conditions.'" *Waterman v. Farmer*, 183 F.3d 208, 213-14 (3d Cir. 1999), quoting *Amatel v. Reno*, 156 F.3d 192, 196 (D.C. Cir. 1998), *cert. denied*, 527 U.S. 1035 (1999). Moreover, where the regulation at issue implicates prison security, particular deference should be accorded to prison

authorities. *Fraise v. Terhune*, 283 F.3d at 516, relying on *Turner v. Safley*, 482 U.S. at 84-85.

Here, as previously discussed, defendant contends that the policies at issue serve the penological interests of furthering prison security and encouraging compliant behavior in particularly disobedient and rebellious inmates.[33] Plaintiffs do not appear to challenge the legitimacy of these governmental objectives but rather contend that there is no rational connection between these objectives and the policy of prohibiting Level 2 inmates to have newspapers, magazines and photographs in their cells.[34]

Specifically, with respect to the prison's interest in encouraging compliant behavior, plaintiffs argue that rehabilitative goals are only furthered by maintaining contact with the outside world and that isolating these inmates from such contact is therefore counter productive. As well, plaintiffs contend that because the LTSU invokes other compelling rehabilitation incentives that the additional inducements of prohibiting newspapers, magazines and photographs are only marginally worthwhile.

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[33] We note here that defendant does not dispute that the policies at issue infringe on plaintiffs' First Amendment rights in the first instance but argue that they should nevertheless be upheld because they are reasonably related to legitimate penological interests.

[34] Although defendant has challenged whether plaintiffs have exhausted administrative review of the policy against photographs, plaintiffs have submitted documentation which suggests that they have. *See* Plaintiffs' Reply to Defendant's Motion for Summary Judgment (Docket No. 23). As such the issue is properly considered by the Court. *See Ahmed v. Dragovich*, 297 F.3d 201, 209 n.9 (3d Cir. 2002); *Perez v. Wisconsin Dept. of Corrections*, 182 F.3d 532, 534-37 (7th Cir. 1999).

The difficulty with plaintiffs arguments, in our view, is that having newspapers and magazines available to them while in the general population or the Special Management Unit apparently did nothing to further their rehabilitation or they wouldn't now be in the LTSU. Indeed, plaintiffs are in the LTSU because efforts in other units failed thus already proving themselves to be the most incorrigible, the most difficult, and the most problematic prisoners.[35] Having consequently been transferred to the LTSU, it seems not only rational to impose more restrictive conditions in an effort to encourage compliant behavior but imperative to the success of the LTSU.

Plaintiffs also argue that defendant's security objectives are not rationally related to the prohibition of newspapers, magazines and photographs since there are other means available to these prisoners to start fires, hurl waste, conceal contraband and create weapons. The fact that the policy does not completely eliminate the opportunity for these inmates to create security concerns, however, does not, in our view, render the policy unrelated to those concerns or negate the prison's interest in minimizing the prisoners' access to materials that are most easily and commonly used as weapons or to set fires and fling feces. Indeed, it appears less likely that an inmate would use their bedding, clothes, legal and religious papers to start fires or fling feces than the daily newspaper.

Moreover, of primary concern is the use of the prohibited items as blow guns and spears for which magazines and newspapers, given their ability to be rolled, are ideal.[36] Plaintiffs nevertheless argue that the

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[35] *See* Dickson Depo. at 25.

[36] Dickson Depo. at 91, 93.

relationship between the policy and this objective is too tenuous to pass constitutional muster as evidenced by the fact that other dangerous and problematic inmates housed in other segregated units do not have the same restrictions imposed upon them. While it may be true that prisoners in the Special Management Unit and Administrative Custody enjoy some access to newspapers and magazines, Deputy Superintendent Dickson testified that should they show a propensity to use them as weapons or to set fires and fling feces that they too "would be on their way to the LTSU."[37] Thus, it appears that the inmates in the other segregated units do not present the same security concerns as those in the LTSU and the fact that they have access to the materials utilized by LTSU inmates as weapons does not serve to sever the connection between the prohibition at issue and prison security.

Because the record appears to support a finding that the policy denying Level 2 inmates access to newspapers, magazines and photographs bears a valid and rational connection to legitimate prison objectives, the first *Turner* factor appears to weigh in defendant's favor.

Similarly, it appears clear that the second factor – whether these inmates have an alternative way of exercising their constitutionally protected rights – also weighs in defendant's favor. Significantly, the prison's policy denying plaintiffs access to the cited articles is not a blanket prohibition. To the contrary, each of these prisoners has the option of modifying their behavior and being promoted to a less restricted environment where access to newspapers, magazines and photographs may be enjoyed. Moreover, it appears that Level 2 inmates are able, albeit on a limited basis,

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[37] Dickson Depo. At 92.

to visit with loved ones and are able to carry on a correspondence.[38]

The third factor appears to weigh in favor of the prison's policy as well. This prong of the *Turner* test obligates the court to consider the effect that accommodating the right would have on fellow inmates, prison staff and on the allocation of prison resources. *Fraise v. Terhune*, 283 F.3d at 520; *DeHart v. Horn*, 227 F.3d 47, 57 (3d Cir. 2000).

In *Fraise v. Terhune, supra*, a group of inmates brought suit alleging that the prison policy which authorizes prison officials to designate and transfer core members of "security threat groups" was violative of the Free Exercise Clause of the First Amendment as well as the Equal Protection and Due Process Clauses. As in the present case, the prison's stated penological objective for justifying the policy was prison security. In addressing the third *Turner* factor, the Court of Appeals for the Third Circuit quoted the Fourth Circuit's opinion in *In re Long Term Admin. Segregation of Inmates Designated as Five Percenters*, 174 F.3d 464, 470 (4th Cir.), *cert. denied*, 528 U.S. 874 (1999), which in turn relied upon *Turner*, stating that:

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[38] As well, although plaintiffs have stated that there is no opportunity to see their minor children and other relatives because the Department of Corrections prohibits minors from visiting Level 2 inmates, *see* Plaintiffs' Brief in Support of Their Motion for Summary Judgment, p. 16 (Docket No. 21), the LTSU Rules and Regulations, which have been provided by plaintiffs, states that the number of visitors during any given time is two which may include one child under the age of 18 and that "[t]he Shift Commander has the discretion to permit additional visitors such as small children and/or infants on a case-by-case basis." *See* Appendix to Plaintiffs' Brief in Support of Their Motion For Summary Judgment, p. 23 (Docket No. 22).

> Prison administration often involves tradeoffs. In the closed environment of a prison, greater liberties for some may mean increased danger and intimidation for others. Because increased freedom for the Five Percenters would come "only at the cost of significant less liberty and safety for everyone else, guard and other prisoners alike," we are particularly reluctant to interfere with the judgment of the [prison officials] in this case.

Fraise v. Terhune, 283 F.3d at 520. Noting that under *Turner* a highly deferential standard should be applied when there is a "ripple effect" on others, the *Fraise* Court found that the fourth prong had been satisfied. *Id.*

Here, having already found ample evidence to support a finding that access to newspapers, magazines and photographs presents a threat to the security of both guards and other prisoners in the LTSU, it appears that accommodating plaintiffs' asserted right would have the very "ripple effect" referred to in *Turner* and *Fraise*. Accordingly, the prison officials are entitled to a high degree of deference and, under *Fraise*, the third factor also appears to weigh in defendant's favor.

Nor does plaintiffs' renewed argument that because inmates in other segregated units have access to newspapers and magazines without negative impact compel a different result. Indeed, it is not the mere presence of the magazines and newspapers that create the security concerns but what these particular inmates have chosen to do with them. The fact that other segregated inmates have not created the same security concerns while in possession of newspapers and magazines is one reason why they are in those units and not in the LTSU. Indeed, it appears that the

same fate awaits any of the inmates confined in any of the other segregation units that cannot maintain an acceptable level of behavior. Conversely, plaintiffs are being deprived of newspapers and magazines because they have already proven themselves to be unwilling to behave in a responsible manner which precipitated their transfer to the LTSU in the first instance.

In addition, as argued by defendant, absent allowing plaintiffs access to the prohibited materials, which has proven unsuccessful, the only alternative appears to be individually escorting Level 2 prisoners to the mini library which is the only available site in the LTSU for reading newspapers. Such an accommodation, however, would not only intensify security concerns by increasing the amount of inmate movement but it would seemingly place a formidable burden on the LTSU staff. *See Allah v. Al-Hafeez*, 208 F.Supp.2d 520, 530 (E.D.Pa. 2002) (Finding that the third *Turner* factor weighed in defendants' favor where plaintiff's behavior created a security concern and that accommodating his attendance at religious services would require more monitoring thereby straining prison resources and affecting the prison staff and other inmates.)

Finally, the court must evaluate where there are alternatives to the policy that would impose only a de minimis cost to valid penological interests. *Fraise v. Terhune*, 283 F.3d at 513-514.

Plaintiffs suggest that an alternative would be to establish a reading period during which guards would deliver newspapers and magazines to each inmate in their respective cells and retrieve them at the end of the period. Plaintiffs argue that the number of publications that each inmate could have in his cell at one time could be limited as well as the number of days each week that the reading materials would be distributed.

We fail to see, however, how having a designated reading period would prevent the Level 2 inmates from using the reading material provided to them to start fires, fling feces or create weapon, as they have shown a willingness to do. Indeed, it appears that in order to give effect to plaintiffs' proposed alternative a guard would be required to monitor each cell during the reading period thus impacting not only the guards and other inmates but prison resources as well. Moreover, implementing plaintiffs' suggestion would not be without sacrifice to the prison's behavioral modification goals. It therefore appears that the cost of plaintiffs' proposed alternative is not de minimis and the fourth consideration set forth in *Turner* also appears to weigh in defendant's favor. *See Fraise v. Terhune*, 283 F.3d at 521, quoting *Turner*, 482 U.S. at 91 ("We reiterate that our inquiry is not whether the state could have adopted a less restrictive alternative but rather it could have adopted an alternative that imposed only 'de minimis cost to legitimate penological interests.'")

Because all of the factors set forth in *Turner* appear to weigh in defendant's favor, the LTSU's policy prohibiting access to newspapers, magazines and photographs appears to be reasonably related to legitimate penological interests and, thus, is properly upheld notwithstanding its intrusion on plaintiffs' Constitutional rights.

For these reasons, it is recommended that the motion for summary judgment submitted on behalf of defendant (Docket No. 16) be granted, and plaintiffs' motion for summary judgment (Docket No. 20) be denied.

Within ten (10) days of being served with a copy, any party may serve and file written objections to this Report and Recommendation. Any party opposing the objections shall have seven (7) days from the date of

service of objections to respond thereto. Failure to file timely objections may constitute a waiver of any appellate rights.

Respectfully submitted,

/s/ Robert C. Mitchell

ROBERT C. MITCHELL
United States Magistrate Judge

Dated November 15, 2002

	RHU	SMU	LTSU
Activities	In Cell	Phase 5, 4 and 3-In Cell Phase 2 in Small Groups	Same as RHU
Commissary	DC Status – Toilet Articles AC-Status-In accordance with AC Commissary List. **No Tobacco products permitted.**	Phases 5 and 4-Writing Materials Only Phase 3-$10 per week (no clothing) Phase 2-$20 per week (no clothing) **No Tobacco products permitted.**	Level 2 – None Level 1-$5 per week **No Tobacco products permitted.**
Compensation	As per DC-ADM 816, Inmate Compensation System	Same as RHU	Same as RHU
Counseling Services	In Cell Visits by Counselor	Phases 5, 4 and 3-In Cell Visits by Counselor Phase 2 / Small Group Unit	Same as RHU
Educational Services	Both Status-In cell as approved by PRC	All Phases – In cell as approved by Unit Team Phase 2 – Small Group in Unit	Level 2-In cell study (GED and Special Ed, if approved) Level 1 – None
Employment	DC Status-Unit Janitor (if no AC available) AC Status – Unit Janitor	Phases 5 and 4 – None Phase 3 – Unit Janitor (if no phase 2 available) Phase 2 – Unit Janitor	Level 2 – Unit Janitor (if no Level 1 available) Level 1 – Unit Janitor
Exercise	1 Hour – 5 Days a Week	Same as RHU	Same as RHU
Laundry	Twice per week	Same as RHU	Same as RHU
Legal-Religious Materials	Contents of 1 Records Center Box	Same as RHU	Same as RHU
Library Services	Recreational books from library. Mini law library on unit.	Same as RHU	Same as RHU
Mail-Incoming Publications	Legal/Personal Correspondence as per DC-ADM 803, Inmate Mail and Incoming Publications	Phase 5 – 1 Newspaper, 10 Photos Phase 4 – 1 Newspaper, 10 Photos, 1 Magazine Phase 3 – 1 Newspaper, 10 Photos, 10 Magazines Phase 2 – Same as Phase 3	Level 2 – Legal/Personal Correspondence Level 1 – Legal/Personal Correspondence, 1 Newspaper, 5 Magazines
Medical-Dental	In Unit Screening	Same as RHU	Same as RHU
Mental Health	In Unit Screening	Same as RHU	Same as RHU
Property	AC/DC Status – Toilet Articles, Shower Shoes, Eyeglasses, Dentures	All Phases – Shower Shoes, Dictionary, Eyeglasses, Dentures	Both Levels-Shower Shoes, Dictionary, Eyeglasses, Dentures
Radio-Television	DC Status – None AC Status – As approved by PRC	Phases 5 and 4 – None Phase 3 – Radio only Phase 2 – Radio and Television	Level 2 – None Level 1 – None
Religious Activities	In Cell Visits by Chaplain	Same as RHU	Same as RHU
Showers	Three (3) per week	Same as RHU	Same as RHU
Telephone Calls	DC Status As per DC-ADM 801, Inmate Discipline AC Status As per DC-ADM 802, Administrative Custody Procedures	Phase 5 – and 4 – Emergency Only Phase 3 – One per month Phase 2 – One every 2 weeks	Level 2 – Emergency Only Level 1 – 1 per month
Visits All Non-Contact	DC Status – 1/month immediate family. AC Status – 1/week	Phase 5 – 1/month immediate family Phases 4 & 3–1/week and 2 weekend/holiday a month Phase 2 – 1/week and 3 weekend/holiday a month	Level 2 – 1 per month immediate family Level 1 – 2 per month immediate family